COURT, U. S.

No. 73-806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL PETROLEUM REFINERS ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *et al.*,
Respondents.

OPPOSITION OF RESPONDENT-INTERVENORS, ENVIRONMENTAL DEFENSE FUND, CONSUMERS UNION, AND CONSUMER FEDERATION OF AMERICA, TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondent-Intervenors (three public interest organizations devoted to protection of environmental and consumer concerns) oppose issuance of a writ of certiorari to review the judgment and opinion entered in this case by the United States Court of Appeals for the District of Columbia Circuit.

JURISDICTION

The Court's jurisdiction is invoked by Petitioners under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the Federal Trade Commission have statutory authority to issue substantive Trade Regulation Rules which will thereafter be relied upon in subsequent adjudicative enforcement proceedings?

STATUTE INVOLVED

Sections 5 and 6 of the Federal Trade Commission Act, 15 U.S.C. 45-46, as set forth in Petitioners' Appendix at A-7-13.

STATEMENT OF THE CASE

On July 30, 1969, the FTC published in the Federal Register (34 Fed. Reg. 12449) a proposed Trade Regulation Rule declaring that the failure to post "research" octane ratings on gasoline pumps at service stations would constitute an "unfair method of competition" and a "deceptive practice" under Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). Extensive hearings were held, numerous interested persons (including Petitioners' representatives as well as two of the Respondent-intervenors) submitted their views orally and in writing, and all requirements of the rulemaking provisions of the Administrative Procedure Act were observed (5 U.S.C. 553).

On December 30, 1970, the Commission issued an Octane Posting Rule, which had been substantially amended in response to submissions made during the rulemaking, and allowed the industry a six-month grace period before the Rule became effective (36 Fed. Reg. 354).

During that grace period, the Texaco Company wrote the Commission advising it of certain problems about the reliability of the "research" octane rating method required by the Rule. Thereupon, the Commission postponed the effective date of the Rule, re-opened the record for further public comments on the method to be used in computing octane ratings (36 Fed. Reg. 7309) and engaged its own technical consultant from the School of Engineering at the University of California to examine the record.

On August 19, 1971, the Commission published a second proposed Octane Posting Rule based on a different method for computing octane ratings,[1] and again invited public comments (36 Fed. Reg. 16120). On December 16, 1971, the Commission published the final Octane Posting Rule, accompanied by a lengthy modified Statement of Basis and Purpose (36 Fed. Reg. 23871).[2]

DISTRICT COURT PROCEEDINGS. On March 29, 1971, after issuance of the Commission's first Octane Posting Rule, Petitioners filed their Complaint for Declaratory Judgment and Injunctive Relief, challenging the validity of the Rule and the statutory authority of the Commission to issue it (CA App. 1-28).[3] On cross-motions for summary judgment the District Court (Robinson, J.) held that the FTC lacked statutory authority to issue substantive rules such as the Trade Regulation Rules, granted Petitioners' motion for

[1] The Commission proposed the so-called "average laboratory" method which averages the results of the "research" and "motor" methods, and its expressed as (R+M)/2.

[2] The Commission adopted the "average laboratory" method included in its proposed Rule of August 19, 1971.

[3] "CA App." refers to the printed Appendix in the Court of Appeals, a copy of which has been lodged with the clerk.

summary judgment, and enjoined the Commission from implementing the Rule (340 F.Supp. 1343; A-16-29).

Rejecting the Commission's argument that Section 6(g) of the FTC Act, empowering it "to make rules and regulations for the purpose of carrying out the provisions of this Act", was a grant of substantive rulemaking power, the District Court concluded that Section 6(g) was "intended only as an authorization for internal rules of organization, practice, and procedure" (A-19).

In reaching this conclusion, the District Court placed heavy reliance on the "clear" legislative history of the FTC Act (A-19). Since Section 6(g) originated in the House version of the FTC Act, which conferred only investigative powers on the Commission, and since the Senate version made no provision for the promulgation of rules and regulations even though it did establish a strong Commission with the authority to prescribe unfair, deceptive, and anti-competitive business practices, the District Court found that "the rulemaking grant in Section 6(g) could only have been intended as an adjunct to the Commission's investigative powers" (A-19).

The District Court found further support for this conclusion since 1) the FTC had failed for many years to assert the rulemaking authority it now claims; and 2) in recent legislation expanding the FTC's authority, Congress had "clearly and unequivocally" spelled out its grant of substantive rulemaking authority (A-22).

CIRCUIT COURT PROCEEDINGS. On June 27, 1973, the Court of Appeals for the District of Columbia (Wright, J.) reversed the ruling of the District Court and held that the FTC was empowered under its governing statute to

promulgate substantive rules of business conduct which, once issued, would be used by the Commission in adjudicatory proceedings aimed at obtaining cease and desist orders against violations of the Section 5 statutory standard (A-31).

In an exhaustive opinion, supplemented by a detailed analysis of the relevant Congressional debates, the Court initially examined "the words of the statute creating the Commission and delineating its powers" (A-33). Noting that Section 5 of the FTC Act first directs the Commission to prevent unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, and then specifies that this goal is to be accomplished by means of a complaint, hearing, findings, and cease and desist order, the Court of Appeals refused to find anything in Section 5(b) "suggesting that adjudication alone is the only proper means of elaborating the statutory standard" under Section 5(a) (A-34). On the contrary, the Court of Appeals pointed out that decisions from this Court (citing *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) and *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966)) have established "that the powers specified in Section 6 do not stand isolated from the Commission's enforcement and law-applying role laid out in Section 5" (A-38). Because "Section 5 enforcement through adjudication will be expedited, simplified, and thus 'carried out' by use of this substantive rule", the Court rejected Petitioners' arguments to limit the use of Section 6(g) to mere procedural, as opposed to substantive, rules for administration of the Section 5 adjudication and enforcement powers (A-40).

Moreover, the Court of Appeals found its conclusion "reinforced by the construction courts have given similar provisions in the authorizing statutes of other administrative

agencies" (A-40), citing Supreme Court cases upholding the rulemaking authority of the Federal Communications Commission (*United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956)), the Food and Drug Administration (*Weinberger v. Hynson, Westcott & Dunning, Inc.*, U.S. (1973), 37 L.Ed, 2d 207), the Federal Power Commission (*FPC v. Texaco, Inc.*, 377 U.S. 33 (1964)), the Interstate Commerce Commission (*American Trucking Assns. v. United States*, 344 U.S. 298 (1953)), the Federal Reserve Board (*Mourning v. Family Publications Service, Inc.*, U.S. (1973), 41 U.S. Law Week 4517), and the National Labor Relations Board (*NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969)).

As to the legislative history of the FTC Act, upon which Petitioners relied so heavily, the Court's examination revealed that it was "ambiguous" at best, but that in no event did it "compel the conclusion that the Commission was not meant to exercise the power to make substantive rules with binding effect in Section 5(a) adjudications" (A-54).

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals, upholding the FTC's statutory authority to use substantive rulemaking as a means of carrying out its Section 5 responsibilities, is eminently correct. Relying primarily upon the plain meaning of Section 6(g) of the FTC Act, authorizing issuance of "rules and regulations for the purpose of carrying out the provisions" of the Act, the court below carefully and painstakingly disposed of all of Petitioner's arguments. In particular, the Court focused upon the legislative history of the FTC Act and, upon careful analysis of debates and

Committee reports, properly concluded that Congress was never straightforwardly confronted with the question of whether the FTC was to proceed via rulemaking as well as case-by-case adjudication. Faced with ambiguous, indecisive, and admittedly murky legislative history, it would have been the height of judicial interventionism for the Court of Appeals to rule in Petitioners' favor – to override the plain meaning of the statute; to ignore this Court's own admonitions that Section 5 and Section 6 of the FTC Act are to be read as an "integrated whole", and to reject the general trend of administrative law decisions from this Court recognizing that rulemaking is flexible, practical, and fairer to those among the regulated than other available administrative techniques. In short, finding no merit in Petitioners' arguments the Court of Appeals correctly refused "in the absence of compelling evidence that such was Congress' intention . . . [to] prohibit administrative action imperative for the achievement of an agency's ultimate purposes", *Permian Basin Area Rate Cases*, 390 U.S. 747, 787 (1968).

Petitioners attempt to avoid the force of these compelling considerations by beclouding the issue before this Court with appealing complaints about "radical" new FTC procedures which lack due process safeguards. But such arguments simply do not withstand analysis.

First, there is nothing particularly "new" about substantive Trade Regulation Rules since the FTC first commenced such proceedings in 1962.[4] Thus, the Commission has been exercising substantive rulemaking power, with the full knowledge of industry, for over a decade, without any district

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[4] See the Commission's amendment of its Rules of Practice, 27 Fed. Reg. 4636, 4796.

court or court of appeals questioning its authority prior to the present litigation.

Second, the only issue before the Court – as agreed to by all parties – is the *statutory* authority of the FTC to issue the Trade Regulation Rules. Questions about the *procedural* adequacy of those proceedings were explicitly reserved (A-32, 33, footnote 2), and were neither briefed below nor passed upon by the Court of Appeals.

Finally, Petitioners continually and conveniently ignore two procedural options open to them: first, they can always challenge the substance of a Trade Regulation Rule (*i.e.*, whether the Rule itself is arbitrary and capricious) in the kind of suit for injunctive and declaratory relief which they brought below; second, upon being charged with violating a Trade Regulation Rule, they must be afforded all the adjudicatory safeguards (*i.e.*, issuance of complaint, hearing, findings, issuance of cease and desist order) set forth in Section 5(b) and can thereafter obtain judicial review in the appropriate Court of Appeals, as provided in Section 5(c) of the FTC Act. In light of these opportunities to challenge administrative action, Petitioners' claims of lack of due process ring hollow.

Finally, Petitioners complain of "controversy and confusion" in Congress and the business community about the FTC's exercise of rulemaking authority. We suggest that such controversy and confusion is mostly of Petitioners' own making.

After over a decade of FTC rulemaking, the question of the Commission's statutory authority has reached only one Court of Appeals. And it has responded with a clear and resounding affirmance of the Commission's power. There

are no contrary judicial precedents from any other Circuit or from any other district court other than that reversed in this case. We fail to perceive what "controversy and confusion" can exist on this issue.

As to alleged "uncertainty" in the Congress, that hardly constitutes a valid reason for granting a petition for certiorari. As a co-equal branch of the American government, the Congress is well-equipped to make its own legislative and political judgments without this Court doing its work for it.

ARGUMENT

I. THE DECISION BELOW, CONSISTENT WITH PRIOR DECISIONS OF THIS COURT, CORRECTLY FINDS THAT THE FEDERAL TRADE COMMISSION HAS STATUTORY AUTHORITY TO ISSUE SUBSTANTIVE TRADE REGULATION RULES AS A MEANS OF MORE EFFECTIVELY AND MORE FAIRLY CARRYING OUT ITS SECTION 5 RESPONSIBILITIES

Section 6(g) of the FTC Act empowers the Commission to "make rules and regulations for the purpose of carrying out the provisions" of the Act. Recognizing that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency", (*SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)), the FTC decided in 1962, to issue Section 6(g) Trade Regulation Rules which would provide clear, substantive standards of conduct defining for members of an affected industry what practices fell within the broad proscriptions of Section 5(a) of the Act. In the present case the Commission determined, after extensive hearings under the Administrative Procedure Act,

that it would be both unfair and deceptive for service stations to fail to post octane ratings to inform consumers what octane gas they were purchasing.

The decision of the Court of Appeals upholding the statutory authority of the FTC to issue such substantive rules is firmly gounded in this Court's recent ruling in *Mourning v. Family Publications Service, Inc.*, U.S. (1973), 41 U.S. Law Week 4517, 4521:

> Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act', we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation'.[5]

As the Court of Appeals said below, "the substantive rule here unquestionably implements the statutory plan" (A-40). The Commission has long been criticized for a failure to establish priorities so that it could concentrate its resources on those economic problems with the greatest public impact, for its tendency to undertake protracted litigation concerning relatively trivial issues, for inordinate and unnecessary delay in the processing of cases at both the administrative and judicial level, and for publication of obscure advisory opinions without adequately informing

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[5] See also *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964); *American Trucking Assns. v. United States*, 344 U.S. 298 (1953).

members of the business community of what they can or cannot do within the framework of Section 5.[6]

The use of rulemaking to flesh out the standards of conduct to be applied in subsequent Section 5 adjudications directly addresses these problems. Moreover, as this Court recently emphasized, after acknowledging the great efficiency of rulemaking for an agency faced with a particularly heavy caseload, "a case-by-case approach is inherently unfair because it requires compliance by one manufacturer while his competitors marketing similar drugs remain free to violate the Act", *Weinberger v. Bentex Pharmaceuticals,* U.S. (1973), 37 L.Ed. 2d 235, 242.

Thus, it is particularly ironic that Petitioners choose to attract this Court's review by consistently raising the specter of wholesale denial of the rights of due process. For in addition to the fact that both the District Court and the Courts of Appeals (A-17-18, A-32-33, footnote 2) both decided this case solely on the threshold question of the FTC's statutory authority and thereby excluded consideration

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[6] Henderson. *The Federal Trade Commission: A Study in Administrative Law and Procedure* (1924); Cushman, *The Problems of the Independent Regulatory Commission,* p. 24 (1937); Commission on Organization of the Executive Branch of the Government, *Task Force Report on Regulatory Commissions* (Hoover Commission Report) (1949); Bureau of the Budget, Federal Trade Commission Study 4 (Staff Report No. (F-60-124) (1960); Senate Committee on the Judiciary, 86th Cong., 2d Session, Report on Regulatory Agencies to the President-Elect (1960) (Landis Report); Auerbach, *The Federal Trade Commission: Internal Organization and Procedure,* 48 Minn. L. Rev. 383, 390, 445-449, 464-465 (1964); Cox, Fellmuth & Schultz, *The Consumer and the Federal Trade Commission,* pp. 51-71 (1969) (Nader Report); *Report of the ABA Commission to Study the Federal Trade Commission,* p. 310, 311, 328-32 (1969) (ABA Commission); Baum, *Reorganization, Delay and the Federal Trade Commission,* 15 Admin. L. Rev. 92, 93, 108-110 (1963).

of all procedural arguments, the conclusion is inescapable that substantial due process advantages inhere to Petitioners and other members of the business community from rule-making rather than individual case-by-case adjudication. After analyzing these advantages at length, the Court of Appeals summarized as follows (A-49-50):

> To us, these cases [*Chenery, supra, Wyman-Gordon, supra,* and *Bell Aerospace Division of Textron, Inc. v. NLRB*, 475 F.2d 485 (CA 2, 1973)] suggest that contemporary considerations of practicality and fairness – specifically the advisability of utilizing the Administrative Procedure Act's rule-making procedures to provide an agency about to embark on legal innovation with all relevant arguments and information, 5 U.S.C. 553 – certainly support the Commission's position here . . . [U]tilizing rule-making procedures opens up the process of agency policy innovation to a broad range of criticism, advice and data that is ordinarily less likely to be forthcoming in adjudication . . .
>
> Such benefits are especially obvious in cases involving initiation of rules of the sort the FTC has promulgated here . . . a vast amount of data had to be compiled and analyzed, . . . True, the decision to impose a bright-line standard of behavior might have been evolved by the Commission in a single or a succession of adjudicatory proceedings. . . But evolution of bright-line rules is often a slow process and may involve

> the distinct disadvantage of acting without the broad range of data and argument from all those potentially affected that may be flushed out through use of legislative-type procedures.

As part of their deprivation of due process argument, Petitioners suggest that rulemaking is a "radical" new procedure designed to deny them their rights under Section 5(b) of the FTC Act. Were the use of Trade Regulation Rules quite as "radical" as Petitioners argue, surely they would have been challenged in more than one proceeding in the decade they have been used by the FTC, and more than one district court judge who has now been reversed, would have found Petitioners' arguments persuasive. [7]

More importantly, Petitioners do, in fact, retain all their existing Section 5(b) rights. In order for the Commission to proceed against them, a complaint must be issued, a full hearing must be held, findings of fact must be made, and a cease and desist order must be issued. Such final order is, of course, reviewable in the appropriate Court of Appeals, 15 U.S.C. 45(c).

Thus, the FTC procedure in reality operates to give Petitioners two bites at the administrative apple: first, they are given full opportunity under the Administrative Procedure

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[7] Petitioners have, it is true, done all they could to stop any government agency from imposing a requirement for the posting of octane ratings. Thus, for example, they have filed suit against a Cost of Living Council decision requiring such posting, raising substantially the same arguments raised herein, but tailored to the specifics of that case (*National Petroleum Refiners Assoc. v. Dunlop*, D.C.D.C., C.A. No. 1669-73). Petitioners' request for preliminary injunctive relief was denied by the Temporary Emergency Court of Appeals on Sept. 4, 1973.

Act to participate in the rulemaking, and then to challenge it in court as they have done in the present proceeding; and second, they are given an additional opportunity in a Section 5 adjudicatory proceeding to establish that they have not violated the Trade Regulation Rule (in whose formulation they have had the opportunity to participate) or that it is inapplicable to them, and to seek judicial review of any adverse findings entered against them.

In the face of clear and plain statutory language in Section 6(g), in the face of a long line of decisions from this Court upholding the exercise of substantive rulemaking authority when necessary to implement the enabling statute, and in the face of what even Petitioners concede to be the advantages of rulemaking (Petition for Writ of Certiorari, p. 20), Petitioners can invoke only some scattered bits and pieces of ambiguous legislative history – analyzed in painstaking detail by the Court of Appeals in the Appendix to its opinion – to try to prove that Congress did not intend the FTC to issue substantive rules.

But the negative inferences on which Petitioners' case is built, and the "casual statements from floor debates, not always distinguished for candor or accuracy" (*Schwegman Bros. v. Calvert Distillers*, 341 U.S. 384, 396 (1950)), do not constitute the "compelling evidence" of Congressional intention which this Court has required in order "to prohibit administrative action imperative for the achievement of an agency's ultimate purposes", *Permian Basis Area Rate Cases*, 390 U.S. 747, 787 (1968).

Finally, it should be made clear that despite the passage of extensive legislation affecting the FTC in the decade it has been exercising authority to issue substantive rules, never once has Congress taken definitive action – *i.e.*,

actually passed legislation – to modify or eliminate that authority.[8] Moreover, Petitioners' assertion that Congress has on three occasions passed statutes "superseding" Commission Trade Regulation Rules is patently misleading (Petition for Writ of Certiorari, page 21, footnote 10). Congressional action concerned only the substance of these individual Rules (upholding the Rule on unsolicited mailing of credit cards,[9] reversing the cigarette labelling Rule,[10] and adopting the substance of the Rule on

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[8] Petitioners take great comfort from the fact that on six separate occasions Congress has specifically granted the FTC substantive rulemaking authority. But, as the Court of Appeals concluded, in examining the history of these laws (A-74-75):

> it is equally possible that Congress granted the power out of uncertainty, understandable caution, and a desire to avoid litigation.
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> • • •
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> Where there is solid reason, as there plainly is here, to believe that Congress, in fact, has not wholeheartedly accepted the agency's viewpoint [questioning whether it had statutory rulemaking authority] and instead enacted legislation out of caution and to eliminate the kind of disputes that invariably attend statutory ambiguity, we believe that relying on the *de facto* ratification argument is unwise.

[9] The credit card rule was issued at 35 Fed. Reg. 4614, and later incorporated into the Truth-in-Lending Act, 15 U.S.C. 1642, *et seq.*

[10] The cigarette labelling Rule appears at 29 Fed. Reg. 530, 8324, 12626, 15570, 30 Fed. Reg. 9484, and was changed in the Federal Cigarette Labelling and Advertising Act, 15 U.S.C. 1331, *et seq.*

shipping unordered merchandise),[11] not the use of rule-making authority. What is crucial to note is that Congress refused in each instance to take any action jeopardizing the Commission's statutory power to issue such Rules.[12]

In sum, the relevant legislative history amassed before, during, and since passage of the FTC Act cannot be construed to overcome the plain language of Section 6(g), especially viewed in the context of the Commission's statutory framework and responsibilities, and the long line of judicial precedent from this Court, most recently reinforced by *Mourning, supra,* and *Weinberger v. Hynson, Westcott & Dunning, supra.*

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[11] The proposed Rule on shipment of unordered merchandise appears at 35 Fed. Reg. 10116, 14328, and was then incorporated into the Postal Reorganization Act, 31 U.S.C. 3009.

[12] In the case of the Cigarette Rule, the Conference Report was very explicit: "The conference substitute provides that except for prohibitions applicable to cigarette advertising, nothing in this legislation shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes, nor to affirm or deny the Commission's holding that it had the authority to issue the trade regulation rules or to require an affirmative statement in any cigarette advertising", 2 U.S. Code & Cong. News, 89th Cong., 1st Session, 2368 (1965).

II. THE MISSION OF THE FTC, WHETHER CARRIED OUT THROUGH ADJUDICATION OR SUBSTANTIVE RULEMAKING, IS NO DIFFERENT FROM THAT OF OTHER REGULATORY AGENCIES WHOSE ACTIVITIES MAY ALSO AFFECT LARGE SEGMENTS OF THE AMERICAN ECONOMY

Petitioners and their amici, American Bankers Association, the National Retail Merchants Association, and the National Consumer Finance Association, seek to paint a picture of the Federal Trade Commission as an all-powerful Big Brother of the marketplace, regulating "virtually every act or practice in the entire economy,"[13] seemingly without restraint. Consequently they argue on the one hand that review is warranted because the decision below gives the FTC power to proscribe "every and any detail of the manufacture, sale, pricing, distribution, retailing, financing, advertising, promotion, and point-of-sale presentation of every product and service, whenever the Commission concludes that they are 'unfair' ".[14] On the other hand, they argue that the FTC's exercise of rulemaking is not to be judged by the same legal principles as those applied in analagous cases (such as *Storer, supra; Texaco, supra; Wyman-Gordon, supra;* and *Mourning, supra*), because "Congress has confined the granting of substantive rulemaking power to agencies possessing pervasive regulatory authority over specific agencies,"[15] and review is therefore warranted because of the erroneous application of those principles to the FTC.

[13] See Brief Amicus Curiae for the National Retail Merchants Association, p. 9.

[14] Brief Amicus Curiae for the National Retail Merchants Association, p. 5, footnote omitted.

[15] Petition for A Writ of Certiorari, p. 13.

Apart from the inconsistency of the two arguments we submit that neither one is persuasive. In terms of the relevant principles of administrative law enunciated by this Court in the cases just cited, there is no difference between the vast powers exercised by the FCC regulating every radio and television station in the country, by the NLRB with the power to oversee the labor relations practices of almost every interstate employer in the country, by the Federal Reserve Board whose activity impacts every bank in the country – and the FTC. We submit that in our complex inter-related economy, where there no longer exists any isolated, self-sufficient industry, the dichotomy suggested by Petitioners is totally unsupportable. "This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred" (*Permian Basin Area Rate Cases, supra,* 390 U.S. at 776), not as Petitioners argue, by whether an agency has license-granting authority.

Nor does the extensive regulatory role entrusted to the Commission play any part, as Petitioners claim, in the alleged "controversy and confusion" created in the business community and the Congress by the decision below.

What is the confusion in the business community – other than the obvious apprehension pervading the amici briefs that the FTC may at some point focus on the commercial practices of their own members? There is no conflict among the circuits or among district courts. In the twelve years since the FTC has asserted rulemaking authority, no cases other than the present one have reached decision nor are there any awaiting decision. The law is perfectly clear to any member of the business community prepared to follow it: the FTC has been issuing binding Trade Regulation Rules for over a decade, and its authority to do so

has been vigorously upheld by the one appellate court which has ruled on it.

As to the alleged Congressional confusion and uncertainty about the FTC's rulemaking powers, this surely must be Petitioners' weakest argument of all for asking this Court to grant a writ of certiorari. Congress has full legislative authority to affirm or deny the rulemaking authority of any Federal agency, whenever it so desires.[16] It is not necessary for this Court, with its own heavy mandatory workload, to accept discretionary jurisdiction over a case so as to do the legal research for a co-equal and co-ordinate branch of the government.

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[16] Moreover, whatever the decision of this Court if it issues the writ of certiorari, Congress is free to enact legislation either specifically granting rulemaking power if the Court rules the FTC statute does not now grant it, or denying or limiting such power if this Court rules that the FTC Act does authorize substantive rulemaking.

CONCLUSION

Respondent-intervenors submit that there is no necessity for granting the writ of certiorari. The decision below applies well-accepted principles of administrative law in a manner totally consistent with the most recent cases of this Court. There is no conflict among the Circuits; indeed this case has not even been presented to any other court for final decision, nor is it presently pending in any other Circuit. Thus, it is obvious that there is no "controversy and confusion" over the decision of the Court below. The only "controversy" which exists is Petitioners' disagreement with the decision below. And that, we submit, is insufficient reason for granting a writ of certiorari.

Respectfully submitted,

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January 9, 1974

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of January, 1974, the foregoing "Opposition of Respondent-Intervenors, Environmental Defense Fund, Consumers Union, and Consumers Federation of America, to Petition for a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit" was served as follows:

1) on Petitioners listed below by service of three copies by first class mail, postage prepaid:

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